



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 91 OF 2015

MAHER UNISSA KARIMPLAINTIFF

VERSUS

EDWARD OLUOCH ODUMBEDEFENDANT

RULING

Before me for determination is the plaintiff /applicant's application dated 2nd March 2015. The applicant **MAHER UNISSA KARIM** urges the court to order that the defendant/respondent **EDWARD OLUOCH ODUMBE** be evicted from the plaintiff's premises and that the officer Commanding Industrial Area Police Station do provide security to effect the orders of eviction.

The application was supported by the grounds on the face thereof and a sworn affidavit by the plaintiff Maher Unissa Karim sworn on 2nd March 2015 and the annexures thereto. The applicant contends that the defendant was his tenant who was heavily indebted in rent arrears and who had refused to vacate the premises after the lapse of the one year tenancy agreement but that the defendant had obstinately continued to cling onto the demised premises to the extreme prejudice to the plaintiff.

The plaintiff deposes that the tenancy agreement with the defendant was entered into on 1st February 2014 and the same was to lapse on 31st February 2015 at a monthly rent of kshs 35,000/- and that todate the defendant was in arrears of kshs 127,728.45 which continue to accumulate.

That on 12th September 2014 the plaintiff instructed Valley Auctioneers to levy distress for rent to recover rent arrears but the defendant placed many impediments including filing an incompetent reference at the Business Premises Rent Tribunal (BPRT) which was dismissed. That the defendant also blocked access to the premises which prompted auctioneers to seek for a break in order and that the attached and sold items only fetched a paltry sum of kshs 26,000 which only offset the auctioneers charges.

It is further deposed that the said rent arrears continue to accrue. The plaintiff annexed copy of tenancy agreement dated 1st February 2014, letter dated 12th September 2014 instructing auctioneers to levy distress for rent, proclamation, reference from BPRT and auctioneers letter dated 17th February 2015. The defendant /respondent Edward Oluoch Odumbe filed grounds of opposition on 18th March 2015 and swore a replying affidavit on 17th March 2015 resisting the application. He contends that the application is frivolous, premature, incompetent and an abuse of the court process; that the affidavit by the applicant supporting the application is fatally defective; that the applicant has not met the threshold to get orders of mandatory injunction for eviction of the defendant from Maisonnette No. 43 on LR 2009/16482 situated on Mombasa Road; that no special circumstances have been demonstrated to warrant the orders sought; that the applicant is guilty of material non-disclosure/misrepresentation and

duress; the application is not meritorious and offends the law, the defendant is not in any rent arrears and will pray for statement of account from the plaintiff; and that the application is brought under the wrong provisions of the law.

In his replying affidavit, the defendant deposes that he is not in rent arrears and that the levy of distress was illegal and without any basis. Further, that the reference to the tribunal was proper and was only dismissed on a technicality. In addition, the defendant deposed that he has been negotiating with the applicant on accounts which are not yet settled.

The application was heard orally on 22nd April 2015 after the court directed the tenant to attend court and shed some light on the matter on 19th March 2015, and after he indicated to court that he was willing to move out the premises although he did not believe he owed any rent arrears to the plaintiff as he had been paying to different people and that sometimes he did not get any receipt.

Mr Wachira counsel for the plaintiff/applicant submitted that the subject tenancy lapsed on 31st January 2015 hence there was nothing/relationship between the parties and that it was illegal for the respondent to continue occupying the premises without paying any rent hence he should be evicted being a trespasser. He urged the court to exercise its discretion and issue an eviction order to prevent continued breach as stipulated under Order 40 Rule 2 of the Civil Procedure Rules.

The defendant's advocate send Miss Ochola to hold brief. She informed the court that she had nothing to say as she did not have instructions to proceed with the application. In addition, that she had only come to seek leave of 14 days to file defence and to inform the court that the defendant was still looking for alternative premises to move to.

I have carefully considered the plaintiff's application dated 2nd March 2015 together with the annexures. I have also considered the replying affidavit and grounds of opposition filed by the defendant/respondent. I have further considered the submissions by the advocate for the plaintiff/applicant Mr Wachira.

I note that the application is brought under Order 40 Rules 2 and 4 of the Civil Procedure Rules and Sections 1A, 1 B and 3A of the Civil Procedure Act.

The application sought eviction of the defendant from premises No.LR 209/10482 situated off Mombasa Road and in the alternative an order that the defendant deposits in court kshs 218,728 being accumulated rent arrears and to keep depositing into court the monthly rent of Kshs 35,000/- from March 2015 until the hearing and determination of the application and the suit.

However, at the hearing of the application, Mr Wachira only urged prayer No. 2 which seeks to evict the defendant from the suit premises. I also note that the plaint dated 2nd March 2015 prayed for

2. An order for eviction of the defendant from the suit property, to wit, maisonette No. 43 constructed on LR 209/10482 off Mombasa Road within Nairobi County and delivery of vacant possession thereof to the plaintiff.

3. Costs of the suit and interest.

4. Such other further relief as this Honourable court may deem fit and just to grant.

Paragraph 8 of the plaint claims that the rent arrears was kshs 218,728 up to February 2015 but there was no specific prayer for payment of this sum to the plaintiff by the defendant.

The issue for determination is whether in the circumstances of this case the plaintiff would be entitled to the relief sought which indeed is in the nature of a mandatory injunction which, when granted, would virtually dispose of the suit as a whole at the interlocutory stage.

From the annexures annexed to the plaintiff's supporting affidavit, the plaintiff has indeed demonstrated that there was tenant/landlord relationship between him and the defendant commencing 1st February 2014 and for a period of one year up to and including 31st January 2015.

The plaintiff has also demonstrated that as at 4th March 2015 when this suit and application were filed, the said tenancy had lapsed. There was therefore no land lord/tenant relationship and hence, this court is seized of the jurisdiction to hear and determine the dispute.

Upon the tenancy lapsing on 31st January 2015, in the absence of any notice of intention to extend the period on either side, the defendant was duly bound to yield possession of the premises to the plaintiff as demanded and hence, the continued occupation after expiry of the tenancy was unlawful and could only have been in occupation as a trespasser.

The defendant has not challenged the fact of the tenancy lapsing and him remaining in the premises as a trespasser. His only contention is that he does not owe rent arrears as claimed and that there is a dispute as to what is owing, which accounts have not been settled. He also says that he is looking for alternative accommodation and once he secures then he will vacate the plaintiff's premises. However, as I have stated above, there is no substantive prayer for the rental arrears by the plaintiff and neither has he claimed for mesne profits. The plaintiff simply wants the defendant out of the premises as efforts to levy distress did not bear fruit. The court had occasion to listen to the defendant who indicated that he was willing to vacate the premises and that he was looking for alternative accommodation.

In other words, the defendant essentially does not deny that he is a trespasser into the plaintiff's suit premises but that he seeks indulgence to get alternative accommodation before vacating.

The test for granting a mandatory injunction is different from that enunciated in the **Giella vs Casman Brown** case which is the locus classicus case for prohibitory injunctions. The threshold in mandatory injunctions is higher than in the case of prohibitory injunctions and the Court of Appeal in the case of **Kenya Breweries Ltd vs Washington Okeyo (2002) EA 109** had occasion to discuss and consider the principles that govern the grant of mandatory injunctions. The Court of Appeal held that the test for grant of a mandatory injunction was as correctly stated in VOL 24 of Halsbury's Laws of England 4th Edition paragraph 948 that:-

“ A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally, be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application.

*In the English case of **Locabail International Finance Ltd vs Agro Export & Another (1986), ALI ER 901** which the Court of Appeal in Kenya has followed with approval in many decisions, the court held that:-*

“ A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction, the court has to feel a high sense of assurance that at the end of the trial it would appear that the injunction had been rightly granted, that being a different and higher standard than required for a prohibitory injunction.”

The above decision was cited with approval by the Court of Appeal in the case of **Sharriff Abdi Hassan vs Nadhif Jama Adan CA 121/2005(2006) e KLR** by further observing that:-

“The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standard spelt out in law as stated above that a party against whom a mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for the full hearing of the entire case. That position could be taken by the courts in such cases as those of alleged trespass to property.”

The same Court of Appeal in the case of **Jaj Super Power Cash and Carry Ltd vs Nairobi City Council & 20 others CA 111/2002** stated:

“ This court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken because he can pay for it.”

In my most considered view, the plaintiff’s case herein passes the tests out lined in the above authorities referred to for the grant of a mandatory injunction. On the facts of this case as elaborated in the plaint and supporting affidavit with the annexures showing that there is absolutely no tenant/landlord relationship and or that the plaintiff has acquiesced on his right of vacant possession of the suit premise, coupled with the fact that the defendant has only contested owing rent arrears and not that he is in illegal occupation of the premises(trespasser), and since the tenancy lapsed on 31st January 2015, the defendant herein Edward Oluoch Odumbe cannot have an answer to the plaintiff’s claim as he has not given any, even by way of affidavit or orally in court. He simply asked for more time to vacate the premises as he was looking for alternative premises.

In my view, therefore, there are special circumstances in the plaintiff’s case in that his court cannot aid a trespasser to continue with his illegal acts of unlawfully occupying the plaintiff’s premises rent free when the plaintiff must have incurred money in acquiring it and is not receiving any benefit out of it. The plaintiff is by law entitled to have the defendant evicted if he does not vacate voluntarily since he is an outright trespasser.

In my view, the plaintiff’s case is overwhelmingly strong, plain and clear and therefore I do not see any purpose that will be served by not determining the issue whether or not the defendant is a trespasser in the suit premises at this stage rather than delaying the defendant’s day of reckoning.

In my humble view, the delay in determining the issue will only serve to delay meting out justice to the plaintiff who has, in my view, demonstrated that he is entitled to vacant possession of the demised premises whose tenancy term with the defendant lapsed on 31st January 2015.

Article 159 (2) (b) places a duty upon this court to, in exercising judicial authority which is derived from the people, to be guided by the principle that justice shall not be delayed.

In addition, this court is enjoined by the overriding objectives under Section 1A and 1B of the Civil Procedure Act to ensure prompt, just, fair, proportionate and expeditious disposal of disputes in a cost effective manner to all litigants.

In the premise, I shall not allow the defendant the luxury of delaying justice to the plaintiff when it has become trite clear and plain that the defendant is a trespasser in the plaintiff’s House (Maisonette) No. 43 on LR 209/10482 off Mombasa Road.

The justice of this case demands that I make such a drastic determination of this matter at this stage. The issue raised by the defendant that he does not owe any rent to the plaintiff is irrelevant at this juncture.

In the end, I allow the plaintiff’s Notice of Motion dated 2nd March 2015 and order that the defendant **Edward Oluoch Odumbe** do vacate from the plaintiffs House No. 43 on LR 209/10482 off Mombasa Road within 30 days from the date of this ruling failing which an order of eviction against the

defendant is to issue without any further application by the plaintiff, with assistance of a licensed court Bailiff. The plaintiff/applicant shall have the costs of this application.

Dated, signed and delivered in open court at Nairobi this 9th day of June 2015.

R.E. ABURILI

JUDGE

9.6.2015

Coram Aburili J

C.C. Kavata

No Appearance for plaintiff /applicant

No appearance for the defendant/respondent

Court: this date for ruling was given in court on 22nd April 2015 when both parties were present.

Ruling is pronounced and read in open court as scheduled.

In the presence of Jacob Kiilu clerk from the firm of Mr Waithaka Wachira & company advocates for the plaintiff/applicant.

R.E. ABURILI

JUDGE

9/6/2015